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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-587

OTIS R. BOWEN, as Governor of the State of Indiana;
THEODORE L. SENDAK, as Attorney General of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body;
THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA;
THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA;
THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA;
THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA;

Petitioners,

vs.

UNITED STATES OF AMERICA,
and
DONNY BRURELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Respondents.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Pursuant to Rule 24(4) of the rules of this Court, the Petitioners submit this Reply to the Brief of the United States in Opposition to the Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petitioners do so because the Brief of the United States appears, almost totally, to mischaracterize this case as it is presented in the Supreme Court. The Brief of the United States also misrepresents, by non-disclosure, the position and roll of the United States in this litigation in each court below.

Mr. Justice Cardozo and this Court said in *Shepard v. United States,* 290 U.S. 96 (1933), that it was unfair for the Solicitor General to alter his position on appeal, and to take a posture different than that taken at trial. That case concerned the admission of evidence.

In this case, the Solicitor General has altered the position of the United States on the entire case.

Petitioners also file this reply Brief to emphasize that the United States has never asserted a claim in the District Court against any of the Petitioners herein. The United States filed a complaint against the Indianapolis Public School System (hereafter IPS) in 1968 pursuant to 42 U.S.C. 2000c-6(a). However, it is interesting to note that in the ensuing seven (7) years the United States has never produced any claim against any of the Petitioners herein, nor any statutory authority for it to proceed as a party against the Petitioners in any of the courts below, nor does it do so here.

It must also be emphasized that the Intervening Buckley Plaintiffs in the District Court have totally failed to file any brief in this Court in opposition to the Petitions for Writ of Certiorari filed in this matter.

I. In The District Court

There were two complete trials in the District Court, which resulted from two complaints. The first trial was

in 1971, and was the result of a complaint filed in 1968 by the United States against the Indianapolis Public School System (it is the only complaint the United States has ever filed in this entire litigation — it has never proceeded against the Petitioners, below).

The second trial was in 1973, and was the result of a complaint filed as a class action in 1971 by the plaintiffs Buckley against the original defendant Indianapolis Public School System and the "added defendants" which were the State Petitioners here, and twenty (20) additional school systems in the metropolitan area of Indianapolis, Indiana. The enrollment of those twenty-one (21) school systems for 1972 was approximately 205,175 school children.

In those seven (7) years of litigation, the United States was allowed to participate as a litigant although it never filed a claim against these Petitioners. In seven (7) years of litigation, and two (2) trials, only the Indianapolis Public School System was found to be *de jure* segregated.

The District Court found that all of the other school systems (among which are the Petitioners here) were not *de jure* segregated systems. That finding has never been contested by any party, until now by the United States, and for the first time in this Court.

The United States in those seven (7) years:

(1) Never filed a complaint against these school system Petitioners, or the State Petitioners;

(2) Never sought relief against these school system Petitioners, or the State Petitioners;

(3) Did not discover or offer evidence adverse to the interest of any of these Petitioners;

(4) Did not seek findings, or offer to the trial court findings, against these Petitioners;

(5) Did fully participate in the trial against the Petitioners, and it did offer extensive evidence directed to the question whether an I.P.S. only plan could be effected;

(6) Did state in a pre-trial submission in 1971, and during the course of that trial, that if these Petitioners were shown to have engaged in interdistrict violations, then it would seek relief against them (Tr. 8-9). None was found, and the United States has never contested that absence as error on the District Court's part;

(7) Never contested or questioned in the Court of Appeals the finding in the District Court that the Petitioner school systems were not illegally segregated school systems; and

(8) In the concluding arguments, the United States said, by counsel who attended almost every day of trial and offered a large quantity of evidence, that:

> ". . . On the question of whether racially discriminatory conduct has been shown, our stated position has been that if the [petitioners here] have engaged in intra-district violations, that is, constitutional violations, that in some manner involved *two or more school districts, then some relief against them may be warranted. Upon the evidence that has been presented, we are unable to discern the existence of such violations.*" (Emphasis added) (Tr. 2818)

On brief in this Court the Solicitor General characterizes the second trial in the District Court, (which concluded by that Court finding that these petitioner schools were not illegally segregated schools) as "a memorandum of decision on the remedy phase of the case" (Brief of the

Solicitor General page 5) in which the District Court "declined to consider whether the Uni-Gov statute had the purpose or effect of promoting segregation" (Id. page 8).

But the Solicitor General did not disclose on brief in this Court that in the District Court the United States, after a long trial in 1973, said in closing argument:

> "Our analysis of that legislation [the Uni-Gov statute] persuades us that any inferences of unconstitutional purpose or effect that might be drawn on the present state of the record would be tenuous. Moreover, there *does appear to have been some legitimate interests involved which provide justification for the exemptions of school districts from the Uni-Gov consolidation.*" (Emphasis added) (Tr.9)

The position of the Solicitor General in this Court is not only contrary to that taken in the District Court, but it does in fact totally impeach the United States own position in the District Court and it asks, in effect, that the petitioners should suffer the burden because of that change of position.

Here the Solicitor General cites (Id. page 9) a statement made by the District Court in 1971, (which was clearly erroneous and not pursued by the District Court in the second trial for that reason) on the boundaries of a School district and of a Civil city under Indiana common law. After the District Court's 1971 statement, the United States fully participated in the second proceeding from August of 1971 to July 20, 1973, which involved that very question and the question of the impact of the "Uni-Gov" legislation. At the end of that trial, after very careful examination, the United States arrived at the conclusion set out above. Namely, that in the opinion of the United States, and in its analysis of that legislation any inference

of unconstitutional purpose or effect would be tenuous at best.

The United States seeks here, simply, a chance to relitigate a case, after it commenced this proceeding in 1968, and after the "Uni-Gov" legislation was enacted in 1969, in the sure and certain hope that the District Court will, finally, enter a finding against the Petitioners, which the United States would then vigorously defend under F.R.C.P. 52.

II. In the United States Court of Appeals

In the Seventh Circuit in the 1973 appeal, which forms the bases for these petitions, the United States filed two briefs, one as an "Appellant" and one as an "Appellee." In that latter brief, the United States, as represented in the Seventh Circuit,[1] assumed an affirmative answer to the very question in this case: Can desgregation in a single district be effected by an inter-district remedy against school corporations not involved in, and whose acts did not cause, the single district segregation and which have been found in fact not to be illegally segregated?

There the United States by fiat asserted a right of inter-district relief against these petitioners whether or not there was any inter-district violation. The factual discussion in that brief did not go to an inter-district violation, but only to the kind of inter-district relief which could have been granted, if the assumption of the United States were correct.

Nevertheless, on oral argument after the submission of the briefs by the United States, counsel for the United

1 Compare the position of the Solicitor General before this Court in *Bradley v. Milliken*, 94 S.Ct. 3112 (1974).

States, Mr. Landsberg, admitted, in answering a question in the Seventh Circuit, that in fact the District Court had found these Petitioners not guilty of *de jure* segregation.

But it was hardly a moment pregnant with meaning because in fact the United States never challenged those findings in either court below. But it now does that, implicitly, in this Court, and *for the first time* in this case.

III. In This Court

Here the Solicitor General asserts that it is too soon to review the Court of Appeals decision (Sol. Gen. Brief page 8), and that the District Court did not have this Court's opinion in *Milliken* available for its own education.

Such a position can now be taken only by counsel who did not litigate this case in the trial court.

In fact, the District Court placed its total reliance on the Sixth Circuit's opinion in *Milliken,* and modeled its theory after the Sixth Circuit, because it was the only way—there being no factual or other legal basis for a finding against these school Petitioners—that it could extend its judicial power over those school systems, and these Petitioners. What the District Court would do for metropolitan Detroit, the District Court wanted to do for metropolitan Indianapolis, but there was a critical difference.

Unlike the District Court in *Milliken,* in Indianapolis the District Court *found* that the additional school systems and these Petitioner schools were not segregated school systems.

In short, this case was in a *post-Milliken position* in the Seventh Circuit, and it is here too: the finding which was

never made in *Milliken* about the non-Detroit school systems, was in fact made by the District Court on July 20, 1973. That is, that the additional school systems were not illegally segregated.

Nevertheless, in disregard of its own findings but consistent with the Sixth Circuit's *Milliken* decision, the District Court below entered extensive orders against the non-segregated schools, and those were appealed to the Seventh Circuit. That Court correctly set the orders aside for the non-Marion County Schools, and reversed the District Court. It incorrectly failed to do that for the non-segregated schools in Marion County, Indiana, which are separate and distinct school districts from I.P.S.

The finding of no *de jure* segregation remains as the controlling finding in this school desegregation case, as it is the controlling finding in all school desegregation cases. There is no judicial power in equity absent a finding of a Constitutional violation, or in the presence of a finding that there was no violation. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Swann v. Board of Education*, 402 U.S. 1 (1971); *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973).[2]

Regardless of the form in which a question of fact or law may appear in a school desegregation case, it is subordinate to the controlling finding that a school either is or is not an illegally segregated system. No question will rise higher than that ultimate finding.

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2 It is totally unclear why the Solicitor General and the Assistant Attorney General for the Civil Rights Division of the Department of Justice seek to disregard this well established legal principal that this Court has consistently recognized in these cases, and seek instead to have this Court allow a multi-district remedy against separate and distinct school districts found not to be guilty of *de jure* segregation.

In seven (7) years of litigation in the courts below, no question of fact or law, including the enactment of "Uni-Gov" in 1969, which was one (1) year after the United States filed its Complaint, two years before the first trial ended, and a full four years before the the second trial ended, was greater than or superior to the *found fact* that the Petitioner school systems were not illegally segregated schools.

Conclusion

The finding of no *de jure* segregation by the Petitioner schools was made in the District Court, and it was not challenged directly by any party, or by the Court of Appeals. It was binding on the Court of Appeals, which acknowledged it by correctly reversing the District Court as to those school systems outside Marion County, Indiana.

That same finding is binding here, and it is indeed legally and ethically binding upon even the Solicitor General of the United States, and the Assistant Attorney General for the Civil Rights Division of the Department of Justice. In the Courts below, their attorneys understood and acknowledged that fact.

However, in this Court the Solicitor General seeks a result that the finding of no illegal segregation by the District Court be, in effect, disregarded; and that after litigation for seven (7) long years, several years more shall be the order of the day in Indianapolis. That position is taken here because of the error which was made by the Court of Appeals.

This Court should grant the Writ of Certiorari and reverse that part of the decision of the Court of Appeals

which remanded the case to the District Court for yet another trial.

Respectfully submitted,

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